4-15-1976

In Re: The Marriage of: David Edward Damon and Barbara Damon

Appellant's Brief 1976-SC-0262

APPELLANT'S BRIEF

In The

Supreme Court of Kentucky

No. 76-262

IN RE: THE MARRIAGE OF:
DAVID EDWARD DAMON,
Petitioner-Appellant,

AND

BARBARA DAMON,
Respondent-Appellee.

Appeal from the Kenton Circuit Court
Third Division
No. 28222

BRIEF FOR PETITIONER-APPELLANT

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This is to certify that a copy of the within Brief has been served on R. Barry Wehrman, 303 Pike Street, Covington, Kentucky, 41011, and Honorable Daniel J. Goodenough, Trial Judge, Covington-Kenton County Municipal Building, Third and Court Streets, Covington, Kentucky, pursuant to RCA 1.250 this 14 day of April, 1976.

TERENCE L. MOORE

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QUESTIONS PRESENTED

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STATEMENT OF THE CASE

This matter arose as a result of a Petition for Dissolution of Marriage filed by the Appellee in the Kenton Circuit Court seeking an absolute divorce and adjudication of all proper rights and custody of the three minor children of the parties. The Court, after hearing all the testimony and receiving evidence, entered its Decree of Dissolution on November 6, 1975. According to the terms of this Decree, the Court awarded the two youngest children of the parties, Daniel and Dawn, to the Appellee, and the custody of the oldest child, David, to the Appellant.

On November 13, 1975, Appellant filed his Notice of Appeal to the Kentucky Court of Appeals, concerning only the awarding of the custody of the two children to the Appellee.

ARGUMENT

1. THE TRIAL COURT ABUSED ITS JUDICIAL DISCRETION WHEN IT AWARDED CUSTODY OF THE TWO CHILDREN TO THE APPELLEE.

Both parents are equally entitled to the custody of the children and the Court is to make an objective finding based upon KRS 403.270 and the factors set forth in *Parker* v. *Parker,* 467 SW2d 595, at page 596.

Regarding the first factor of stability and character, the evidence is overwhelming of Appellant's outstanding character and high esteem in the community. More importantly, his love for his children is exhibited by his life of hard work and devotion to the family. The second factor of break-up of the home clearly falls squarely upon the shoulders of the Appellee and Mr. Haskill Swain. Although KRS 403.270 (2) excludes fault in the specific determination of the right to custody, all of the elements of factor two in the *Parker* decision certainly should not, and cannot, be excluded. The Trial Court erroneously held this to be irrelevant at several points in the trial to which this counsel objected. As stated on page 102, Question 27 of the transcript by the son, David Damon,

> "My mom spends a lot of time with the preacher. My little brother doesn't like it. I think that should be taken into consideration. Also, he had a key chain

> with her name on it. It hurt me real bad. I know it hurt my brother."

This plea by the young man was ignored contrary to KRS 403.270 (1) (c) wherein it states:

> "and any other person who may significantly affect the child's best interest"

The Court had a closed mind on the subject as evidenced by it's comment on page 101, Question 25 of the transcript, where the Court was interviewing the son, David Damon:

> "If you are placed with your father, you will be away from your mother and Dan and Dawn."

This, of course, occurred prior to David's statement on the key chain and the day prior to the interview of Daniel and Dawn. Introduction of testimony, and attempted introductions of testimony, regarding the stability and character of the Appellant were rebuffed by the Court, erronously, and no evidence relating favorably to the character of the Appellee was introduced, nor was the Court inclined to consider this aspect of the custody issue.

The testimony concerning the home environment clearly showed the desirability of placing custody with the father. He retained the family home, where his mother, and the children's grandmother, resides adjacent to, and where the thirteen year old boy, Daniel, expressed a desire to reside. (Page 105, Question 20 - transcript) Although the Court in it's questioning stressed the absence of the father from 2:30 p.m. until approximately 12:00 midnight due to work (Page 62, transcript), at no time did the Court inquire as to the "proposed" working habits of the Appellee nor of other factors affecting the children, including financial arrangements. The Appellee has a four room apartment

in Norwood, Ohio (Page 29, Question 217 - transcript). The testimony was that the grandmother would watch over the children while the Appellant worked (Page 44 - transcript). It strains credibility to assume the children would be better off with a sitter than with their grandparent while both the Appellant and Appellee work or, in the case of the Appellee, attend far-flung revival services with Mr. Swain. Daniel's preference for the country, and hence his father without making that traumatic statement directly, should have been considered. As stated in *Mayfield* v. *Haggard*, 490 SW2d 777, at page 780:

> "It is recognized that a boy past his thirteenth birthday is nearing the age when he should have a lot to say about his custody."

The Court applied the tender years doctrine to this thirteen year old contrary to the accepted law of this state. The Court did not go into fault or directly inquire of the children regarding preference out of consideration for their emotions, which the Appellant is in complete agreement with. Nevertheless, the son, Daniel's preference is cogently clear from the record. He desired to be with his father and brother, who is two years older. The Appellee defaulted custody of David, age fifteen, to the Appellant (Page 13, Question 101 - transcript) and the Court merely followed her preference.

The Appellant testified to the effect on the children from being taken from school for revival services (Page 38 - transcript). On Page 42, he related the conversations between David and Daniel regarding talk of suicide by Daniel. This certainly relates to the mental health of all parties as set forth in *Parker*, but the Court likewise ignored this disturbing testimony.

The testimony on behalf of David needs to be briefly summarized. The babysitter, Connie Hicks, stated the Appellee always left with Mr. Swain when she watched the children (Page 71 - transcript) and not always on nights when they had church (Page 72 - transcript). They usually returned around midnight on those days (Page 75 - transcript). Mr. Swain was frequently there when she was not babysitting always after Mr. Damon had gone to work (Page 72, Question 18 - transcript). The children contacted the Appellee at Mr. Swain's trailer by phone on several occasions while she was babysitting (Page 75, Question 42 - transcript).

Mrs. Nellie Swain, the former wife of Mr. Swain, attempted to testify as to the character of the Appellant only to be told by the Court that:

> "Veracity and morals were not in issue in this case." (Page 79, Question 17 - transcript)

James Hicks saw the Appellee kissing Mr. Swain in front of the Damon home after she had sent her children to another part of the premises. Page 89, Question 20 - transcript) Pat Cheeseman saw the Appellee and Mr. Swain physically embracing on several occasions in 1974 prior to the church breaking up. (Page 93, Question 12 - 14, transcript) Also prior to the break-up of the church, the board of trustees demanded that Mr. Swain leave Mrs. Damon alone according to Ralph Byerly, trustee (Page 81, Question 7 - transcript).

While an occasional indiscretion does not make one an unfit mother, *Dudgeon* v. *Dudgeon,* 458 SW2d 159, a course of conduct occurring over approximately five years certainly places her fitness in question. The Trial Court set the impossible standard of the children and/or the

Appellant catching the Appellee and Mr. Swain in sexual embrace.

With the direct testimony of the key chain fob bearing his mother's name by David; the factual recitations of physical embraces in the money counting room at the church; kissing outside the Damon home; Mr. Swain's automobile being present frequently at the Damon home after the Appellant left for work; the frequent week-night meetings with Mr. Swain by the Appellee as recited by the babysitter, Connie Hicks; the break-up of the church over the affair, and the fact of no introduction of controverting testimony by or on behalf of the Appellee, to these facts, leads to the inescapable conclusion that there is no standard of proof which the Appellant could have met to be judged the proper person to have the custody of his children. Certainly, circumstantial evidence can, and does, establish facts. Equality in entitlement to custody was an illusion before this Trial Court.

The Appellant proved by his testimony and his witnesses that he was the fit and proper person to have the custody of his children and at least cast serious doubt on the fitness of the Appellee for their custody. No proof by the Appellee was offered concerning her fitness, nor did the Court seem inclined to inquire into any aspect of her fitness to have the custody of the two younger children. Counsel for Appellee did not appear for the interview of the children, Daniel and Dawn, on the following day as the meaning of the Trial Court's statement on page 101 of the transcript was abvious and custody had been decided.

Having a lover around will affect the relationship between a child and it's cheating parent. That should be so apparent that the necessity of inducing emotion trauma in the children through questioning concerning the affair would be obviated. Although the Court was very aware

of Mr. Swain and his relationship to the Appellee, at no time did it inquire into the effect of Mr. Swain on the children nor take these factors into consideration. Subpoenas were issued by the Appellant for Mr. Swain but they were returned not found and thus any possible illumination of this case by his testimony is absent.

CONCLUSION

Appellant submits that the veracity and morality of a parent and would-be custodian is very material to the consideration of the custody issue. If a person's morals, or lack of them, bear no consideration, then why do we spend so much time and energy in trying to impress children with the difference between right and wrong. Our very system is based on morality. One's morals, or lack of them, of necessity make an impression upon one of tender years. The Trial Court clearly abused its judicial discretion in awarding custody of the two younger children to the Appellee by its obvious disregard of the factors to be considered and its singular obsession with KRS 403.270 (2) to the exclusion of the rest of that statute as well as the factors enumerated in the *Parker* case.

Respectfully submitted,

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